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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 09/955,832  | 09/19/2001  | Dennis A. Lonergan   | PIL0064/US          | 1229             |
| 33072   | 7590        | 08/10/2004           | EXAMINER            |                  |
| KAGAN BINDER, PLLC<br>SUITE 200, MAPLE ISLAND BUILDING<br>221 MAIN STREET NORTH<br>STILLWATER, MN 55082 |             |                      | MADSEN, ROBERT A    |                  |
|   |             |                      | ART UNIT            | PAPER NUMBER     |
|   |             |                      | 1761                |                  |
| DATE MAILED: 08/10/2004   |             |                      |                     |                  |

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                           |                  |
|------------------------------|---------------------------|------------------|
| <b>Office Action Summary</b> | Application No.           | Applicant(s)     |
|                              | 09/955,832                | LONERGAN ET AL.  |
|                              | Examiner<br>Robert Madsen | Art Unit<br>1761 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM  
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 18 March 2004.  
 2a) This action is **FINAL**.                            2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-22 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-22 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
     Paper No(s)/Mail Date \_\_\_\_\_.  
 4) Interview Summary (PTO-413)  
     Paper No(s)/Mail Date \_\_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_.

**DETAILED ACTION**

1. The Response filed May 18,2004 has been entered. Claims 1-22 remain pending in the application.

***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1-4,9-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Taylor (US 3578772) in view of Yamamoto (EP0404957).
4. See the Office Action mailed March 15, 2004.
5. Claims 5-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Taylor (US 3578772) in view of Yamamoto (EP0404957) as applied to claims 1-4,10,11,13-21 above, further in view of Lonegran et al. (US 5672369).
6. See the Office Action mailed March 15, 2004.
7. Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Taylor (US 3578772) in view of Yamamoto (EP0404957) and Henika et al. (US 3615680).
8. See the Office Action mailed March 15, 2004.

***Response to Arguments***

9. In response to applicant's argument that there is no suggestion to combine Taylor and Yamamoto, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Taylor teaches a packaged unproofed frozen dough having a controlled atmosphere *insuring a proper atmosphere* for thawing and proofing (Column 1, lines 1-10,45-53). Yamamoto teaches fermenting dough carbon dioxide rich atmosphere improves flavor , volume, and fermentation time (i.e. shorter) over non carbon dioxide enriched environments during fermentations. Thus, Yamamoto recognizes an improvement over the controlled atmosphere of Taylor by utilizing carbon dioxide. Since Taylor defrosts and proofs in the sealed bag, based on Yamamoto, it would be desirable to include carbon dioxide in the bag to achieve an improvement in the defrosting and proofing steps.

10. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed

invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

11. With respect to applicant's argument regarding Lonergan et al. as applied in claims 5-8, Lonergan et al. are relied on as teaching the conventional leavening agents as well as their effects.

12. With respect to claim 22, in particular with respect to Henika et al., applicant argues that the examiner has not shown a *prima facie* case of obviousness. However, as addressed above in paragraph 9 above, there is motivation for combining Taylor and Yamamoto: improve flavor, volume, and fermentation time. Henika et al. teach it is notoriously well known in the dough art to allow a dough to double in volume (i.e. reach 100% volume increase over the unproofed volume) in the final proof step prior to cooking (Column 1, lines 38-48). Taylor teaches the bag provides the proper atmosphere for proofing. If it is indeed conventional to double the volume of the dough during proofing from its unproofed volume, and Taylor includes a proper atmosphere for proofing the frozen dough, one would expect that Taylor would include a 100% volume increase. Furthermore, since the combination of Yamamoto yields a greater volume, one would expect at least 100% since the Yamamoto method is an improvement over conventional proofing atmospheres.

***Conclusion***

13. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

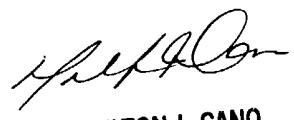
14. A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

16. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

17. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen  
Examiner  
Art Unit 1761



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